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ABSTRACT

Section 15 of the Canadian Charter of Rights and Freedoms, passed by the government in 1982, has been compared in its guarantees of equal rights to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. These equality provisions were deferred for a 3-year period so that federal, provincial, and territorial governments could inspect their legislation, consider and consult about the effect of the provisions on their governmental policies and practices, and legislate necessary amendments. This paper identifies and discusses provincial considerations of educational policy and practice in the equality provisions in general and of section 15 in particular. Part 1 reviews the legislative history of section 15. Part 2 discusses various mechanisms employed by different governments for reviewing statutory enactments. Part 3 concludes with reports on what amendments were made and what measures were taken by the different governments and private interest organizations in revising, reformulating, and abrogating inequitable and offensive legislative provisions and policies. Evidence shows that the federal and provincial/territorial governments generally have adopted a narrow, limited, technical, and superficial approach to the task of harmonizing their legislation with the equality standards in section 15 of the Charter. Included are 35 footnotes and 1 table. (IW)

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The Equality Provisions of the Charter and Educational Policy: Preparations for Implementation

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The Equality Provisions of the Charter and Educational Policy: Preparations for Implementation

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&
Terri A. Sussel

"We know that there are many situations of discrimination or discretion and choice throughout our legislation and policy. The question is whether it is proper discrimination, discretion and choice."

John Crosbie
Federal Minister of Justice
April 1985[1]

"Government must treat those whom it governs with concern, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect."

Ronald Dworkin
Taking Rights Seriously[2]

Introduction

"Weapon of hope," "potent force," "conscience of our nation," "broad net," "bulwark against discrimination": these are just some of the phrases and accolades recently used to describe the equality rights guaranteed in Section 15 of the Canadian Charter of Rights and Freedoms. As agreed by the framers of the Constitution in 1982, these equality provisions were deferred for a three-year period in order that federal, provincial and territorial governments could synchronize their legislation with the equality rights enshrined in section 15. All levels of Canadian governments thus have had the benefit of this three year moratorium during which they have been able to inspect their legislation, to consider and consult about the effect of the

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[1] Cited by Robert Miller, "A New Compromise of Equality," MacClean's, April 22, 1985, p. 48.

[2] Cambridge, Mass.: Harvard University Press, 1977, pp. 272-3.

equality provisions on their statutes, policies and governmental practices, and to legislate amendments in preparation for the date when litigation could be initiated under section 15. That date is now passed. And, while accolades approving the equality rights in section 15 still ring loudly in our ears, far less favourable terms are being used to characterize the three-year track record (April 17, 1982 - April 17, 1985) of the provincial, territorial and federal governments in their efforts to harmonize their legislation with both the letter and spirit of the Charter's equality provisions.

The most frequent criticism of the federal and provincial/territorial governments concerns the eleventh hour preparation, as well as the cautious and superficial nature of proposed Charter-inspired legislative changes. In general, critics charge the various levels of government with not having devoted the time, thought or resources necessary to address inequities engendered in extant statutes, let alone develop any new legislation aimed at combatting discrimination as defined in the Charter.

By contrast, interest groups of different kinds (e.g. those concerned with gender equality and affirmative action, like LEAF -- the newly formed Legal Education and Action Fund, and CREF -- the Charter of Rights Educational Fund, or with the rights of the disabled and handicapped like Ontario's ARCH -- Advocacy Resource Centre for the Handicapped) recognizing the salience of the equality provisions and their potential for broadsweeping social and legal consequences have eagerly anticipated and actually prepared for the implementation of section 15.

A similar pattern of provincial neglect and public anticipation emerges regarding education. In general, little government-sponsored attention has been paid to the implications of section 15 for education across Canada. Indeed, with the exception of individuals knowledgeable about the effect of

the equal protection clause of the Fourteenth Amendment in the United States on educational policy, few Canadians seem to realize that section 15 will have potentially dramatic implications for educational policy in Canada.[3]

Such far-reaching consequences may be gradually revealed, however, as various interest groups in different parts of Canada mount legal challenges involving questions of educational policy based on the Charter's equality provisions. Already, for example the British Columbia Teachers Federation (BCTF) is seeking the equal protection and equal benefit of the law respecting full collective bargaining rights; French-speaking Alberta parents are challenging legislation denying them full equality in the provision and control of francophone educational facilities; and in a highly politicized and emotional case the Metro Toronto Board of Education is challenging the proposed extension of provincial funding to Roman Catholic secondary schools. These initiatives reflect the willingness of individuals and interest groups to challenge existing educational policy and practice in the constitutional arena. To set these and other potential legal challenges in perspective it is helpful to establish precisely what considerations and preparations were made by the different levels of government during the three year moratorium on section 15 with particular reference to educational policy and practice. That was the intent of the study reported here.

Purpose and Scope of the Study

The study was designed, therefore, to investigate the preparations being made prior to April 17, 1985 by the federal, and provincial/territorial governments to harmonize legislation with the Charter's equality guarantees.

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[3] M. Manley-Casimir and T.A. Sussel (eds.), Courts in the Classroom: Educational Reform and the Canadian Charter of Rights and Freedoms, (forthcoming).

More specifically, it sought to isolate contemplated changes in provincial legislation or policy that would in any way touch upon the field of education. A letter-questionnaire was formulated (available upon request) to suggest possible issue areas and to elicit responses to particular questions bearing on equality and education; these questions directed attention to the overall governmental approach to Charter provoked legislative reform, and the possible reorientation of general policies and guidelines in provincial Departments and Ministries of Education. Letters soliciting responses were sent to all Attorneys-General and Ministers of Education across Canada. In addition, provincial teacher and trustee associations were contacted to establish whether they had requested legal opinions on the interpretation of section 15 and whether they were preparing a constitutional challenge based on section 15 considerations.

Responses to the letter-questionnaire and subsequent follow-up questions were quite complete, and -- together with copies of working papers, omnibus legislation, and legal opinions -- provided an overall picture (Table 1) of how different provinces viewed and were preparing for the implementation of section 15. The picture that emerged, however, was far from encouraging in terms of the substantive proposals put forward by government departments for overall legislative revision and reform. Indeed our study of legislative activity revealed, as critics have maintained, that all the governments studied were guilty to greater or lesser extents of relying upon cosmetic, superficial and piecemeal adjustments as substitutes for more comprehensive legislative revision and policy reorientation. This trend was particularly striking with regard to the legislation and policies governing Canadian education and schooling.

This paper identifies and discusses provincial considerations of educational policy and practice in the light of section 15 in particular, and

governmental responses to the Charter's equality provisions in general. The following discussion is divided into three sections. The first part reviews the legislative history of section 15 including the federal-provincial agreement to postpone operation of the equality rights for a three-year period. The next section of the paper discusses the various mechanisms employed by the different governments for reviewing statutory enactments. The paper concludes with a report on what amendments in fact were made by the different provinces/territories in terms of "Charter-proofing" (i.e. revising, re-formulating, or abrogating) inequitable and offensive legislative provisions and policymaking frameworks. Special attention is devoted in this section to equality issues in the educational setting with respect to measures taken both by the provincial governments and by public interest organizations.

I. Legislative and Judicial History of Section 15: Components and Controversies

On April 17, 1985, three years to the day of the Charter's proclamation, the equality provisions enshrined in section 15 came into force. The section provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Together with section 27 (the multi-culturalism provision) and section 28 (the gender provision) section 15 has been touted by legal experts, government representatives, public interest groups and individuals as, "the most

significant development in the (Canadian) human rights field."[4] If the United States experience since 1954 with the Fourteenth Amendment, and the Canadian experience since 1960 with the Bill of Rights are any indication, the equality provisions may become the most highly profiled and frequently litigated Charter section. Specifically designed to overcome the shortcomings of the equality rights section in the 1960 Diefenbaker Bill of Rights, the broad scope and potential impact of section 15 is only fully understood and appreciated when viewed as the final product of a legislative and judicial process that began in the 1960's, was severely set back in the 1970's, and resurrected in the 1980's.

This process began in 1960 with the adoption of the "quasi-constitutional" Canadian Bill of Rights guaranteeing inter alia "equality before the law and the equal protection of the law." By the mid-1970's it became increasingly apparent that the Supreme Court of Canada was unwilling to give the equality section (1(b)) a broad or expansive interpretation. Thus in only one case, Regina v Drybones,[5] did the court hold that a federal enactment contravened "equality before the law". In this renowned and singular case the Court found that section 94 of the Indian Act,[6] which made it an offense for native Indians to be intoxicated off a reserve, offended the "equality before the law" clause in section 1(b). In the reasons for judgements, Mr. Justice Ritchie speaking for the majority of the Court interpreted the equality provisions in section 1(b) as meaning:

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4 Vancouver Sun, April 16, 1985, p. 1.

5 1970 S.C.R. 282.

6 R.S.C. 1970, c. 1-6.

> . . . at least that no individual or group of individuals is to be treated more harshly than another under the law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offense punishable at law on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.[7]

Civil libertarians lauded this decision as an important step forward in the establishment of a more just and equitable Canadian society, only to have their optimism dashed within a few short years as the Supreme Court retrenched its position in a series of cases holding that federal legislation did not violate the equality provisions in section 1(b) of the Bill of Rights if it was enacted to achieve a "valid federal objective."[8] In practice, such interpretation usually turned on the validity of the distribution of powers between the federal and provincial governments, and did not consider the substantive equality issues in question. In other cases, the Court constructed different tests for interpreting section 1(b), which usually resulted in the upholding of federal statutes. For example, in the case of the Attorney-General of Canada v. Lavell,[9] Mr. Justice Ritchie ruled that section 12(1)b of the Indian Act -- which provides that a native Indian woman who marries someone who is not an Indian thereby loses her band membership and Indian status whereas an Indian man does not lose his status and, moreover, passes it on to his spouse -- did not contravene the "equality before the law"

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[7] Supra, note 5 at 297.

[8] MacKay v. The Queen, (1980) 2 S.C.R. 370, Regina v. Burnshine, (1975) 1 S.C.R. 693, Prata v. Minister of Manpower and Immigration, (1976) 1 S.C.R. 376.

[9] (1974) S.C.R. 1349.

clause. The Court reached this conclusion[10] on the basis of the common law definition of "equality before the law" defined by Dicey as "the equal subjection of all classes to the ordinary law of the land, administered by the ordinary courts." In other words, section 1(b), in the view of the Supreme Court, merely guaranteed "procedural" equality and did not give rise to any claim of "substantive" equality rights. Drybones was distinguished from Lavell on just this point, with the Court asserting that "no inequality of treatment (i.e. procedural treatment) between Indian men and women flowed as a necessary result of section 12(1) (b) of the Indian Act".

Subsequent interpretations of the Lavell decision suggested that the Supreme Court's judgement turned on an implicit distinction between "equality before the law" (i.e. procedural equality) and "equality under the law" (i.e. substantive equality). On the basis of this distinction numerous public interest groups and organizations intensely lobbied the Special Joint Committee of the Senate and House of Commons to include both equality guarantees in the final draft of the Charter's equality section. This lobbying effort was successful, as were other representations that urged the Committee to include an "equal benefit" clause along with the "equal protection" provision.

Public pressure for the inclusion of this particular equality guarantee in a charter of rights also had its roots in the Supreme Court of Canada's narrow interpretation of section 1(b) of the Bill of Rights in the Bliss case. In Bliss v. Attorney-General for Canada,[11] the decision involved a pregnant woman, Stella Bliss, who had been employed long enough to qualify for ordinary unemployment benefits (8 weeks), but not long enough (10 weeks)

[10] Ibid., at 1366.

[11] (1978), 92 DLR (3d) 417.

necessary to qualify for maternity benefits. As a result of section 46 of the Unemployment Insurance Act, 1971[12] she could not, however, claim these ordinary benefits since the Act assumed that pregnant women were neither "capable" nor "available" for work during the maternity period. Bliss challenged this provision on the ground that it contravened "equality before the law" as guaranteed in section 1(b) of the Bill of Rights. The Supreme Court of Canada rejected this allegation holding that section 46 of the Unemployment Insurance Act did not discriminate on the basis of sex, but rather made a distinction between pregnant women and all other unemployed persons - whether male or female. Moreover, the Court held that there was no contravention of "equality before the law" as section 46 did not imply the denial of equality in treatment:

> There is a wide difference between legislation which treats one section of the population more harshly than others by reason of race as in the case of R v. Drybones . . . , and legislation providing additional benefits to one class of women, specifying the conditions which entitle a claimant to such benefits and defining a period during which no benefits are available. The one case involves the imposition of a penalty on a racial group to which other citizens are not subjected; the other involves a definition of the qualifications required for entitlement to benefit.[13]

In response to submissions which maintained that the Bliss decision implied a distinction between the "equal protection" and "equal benefit" of the law, the Joint Parliamentary Committee conceded that the final draft of the Charter should contain both guarantees. Thus, section 15 of the Charter contains four distinct and far-reaching protections -- "equal protection" and "equal benefit" "before" and "under the law" -- in large measure designed to

[12] S.C. 1970-71-72, c. 48.

[13] Supra, note 11 at 423.

counteract limitations imposed by the Supreme Court of Canada on the equality provisions of the Bill of Rights. So as to eliminate any possible doubt regarding the intent of section 15, sections 27 and 28 were also included in the Charter as a means of buttressing the fundamental protections of women and minority groups.

Given the unprecedented scope of the equality rights, and the real possibility that such guarantees could spawn a variety of constitutional challenges to both provincial and Federal legislation, the framers of the Constitution agreed to delay the operation of section 15 for three years. During this time it was agreed that Parliament and the provinces would review and amend legislation that failed to meet the safeguards against discrimination contemplated by section 15. Although no concrete proposals were advanced regarding what form such proceedings should take, it was generally expected that during this three-year moratorium, the individual provinces and the federal government would undertake intensive and comprehensive reviews and revisions of legislative enactments and policy directions. For example, Federal Minister of Justice, Jean Chretien, assured the House of Commons as early as October 6, 1980 that:

> . . . the government will act immediately to see to it that our laws comply with the non-discrimination provisions of the Charter of Rights . . . As a government, we now consider ourselves morally bound by the non-discrimination provisions of the Charter, even though it will be three years before we are legally bound.[14]

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[14] House of Commons Debates, Vol. III, Oct. 6, 1980, p. 3285.

As the designated three-year "holding-period" drew to a close, and despite such ringing declarations, it became markedly apparent that neither the Federal government nor the provincial legislatures had lived up to their moral nor legal commitments.

II. Preparation for Section 15: The Legislative Review Process

In all the provinces (as well as in the federal government and territories), some form of general legislative review procedure was initiated with regard to the Charter, and with particular emphasis on the equality provisions. In most cases, responsibility for conducting and coordinating such reviews was assigned to a single Ministry (in most instances Ministries of Justice or Attorneys-General) or intergovernmental committees specifically created to review provincial legislation within all governmental departments and ministries. While individual departments and ministries were consulted and/or represented in this process, the final package of proposed legislative amendments were, for the most part, identified and prepared by a single committee. The institutional arrangements for the preparation of such reviews varied quite significantly from one province to another. Some provinces, for example, established separate fully-staffed legislative review committees within Departments of Justice or Attorneys-General offices; other provinces established interdepartmental committees, while yet others commissioned independent legal opinions. Whatever form of review was initiated, the ultimate goal of all such investigations was to identify statutes, regulations and policies that contravened the "letter and spirit" of the Charter and particularly section 15.

Table 1

Section 15 of the Canadian Charter and Rights and Freedoms: Preparations for Implementation

Provinces	
British Columbia	Charter Omnibus Bill (Bill 33) tabled on April 17, 1985, after review of provincial legislation by an interministerial committee.
Yukon	Charter Omnibus Bill to be tabled in June, 1985.
Alberta	Charter Omnibus Act (Bill 95) tabled November 9, 1984. Fifty lawyers reviewed provincial legislation, and made recommendations to the constitutional law department in the attorney's general office.
Saskatchewan	Charter discussion paper (the first of its kind in Canada) released in September, 1984. Charter Omnibus Bill 41 tabled in April, 1985.
Manitoba	An independent study of provincial legislation was solicited. The review was completed in December 1982 by Dale Gibson. A Charter Omnibus Bill drawing upon the Gibson Study is now in preparation in the Attorney's general office.
Ontario	A two volume study of the implications of section 15 on provincial legislation was released in March 1984. An equality bill was tabled in the Ontario legislature on June 11, 1985.
Quebec	Quebec has opted out of the section 15 provisions by using the section 33 override clause.
New Brunswick	A special committee within the Law Reform Division of the Justice Department was established in March 1982, to review provincial legislation. A Charter Omnibus Bill was tabled in April 1985.
Nova Scotia	A "Coordinating and Evaluating Committee" in the Attorney's-General Office was established to make recommendations to the government with regard to provincial legislation and the charter's equality provisions. Discrimminatory legistation has been identified, but not as yet amended.
Newfoundland	A report by the "Review Committee on Newfoundland Legislation" was released.
Prince Edward Island	
Federal Government	A discussion paper on "Equality issues in Federal Laws" was released in January 1985. An Omnibus Bill (C-27) to amend contentious legislation was also introduced at this time.

The procedure for accomplishing this final goal also varied. Some provincial governments, for example, undertook a very visible review procedure, i.e. releasing discussion papers or reports for public scrutiny before any substantive legislative amendements and reforms were recommended. Saskatchewan led the way in the release of a "slim" public discussion paper in September 1984. More recently in January 1985, Ontario released a more substantial "background paper", Newfoundland issued a Saskatchewan-type report, and the federal government released its version of a public discussion paper. All the provinces (save Quebec), territories and federal government have acknowledged a commitment arising out of the 1982 constitutional negotiations to review and amend legislation to reflect the standards enshrined in the Charter's equality provisions. Although no legal limitations have been imposed for the completion of this ambitious undertaking, any government failing to discharge its obligation risks facing expensive and resource-consuming constitutional challenges in the courts. To date, some of the provinces have complied with their 1982 undertaking by introducing "Charter Omnibus Bills" designed to amend statutory provisions conflicting with various Charter rights: section 15 equality rights have been the focus and have accordingly influenced the majority of most such revisions and amendments.

Not surprisingly, the preparation of such remedial legislation has been delayed beyond the time limit loosely agreed to during the 1982 constitutional negotiations, and has also proceeded at an uneven rate across the country. While all the governments at that time expressed a desire and commitment to have Charter amendments in place by April 17, 1985 -- the date of section 15's coming-into-force -- none of the provincial, territorial, or federal

governments have as yet had Charter Omnibus amendments passed into law in their respective jurisdictions. Thus, far from having Charter-induced legislative revisions in place by April 17, 1985, many Canadian governments can not even claim to have introduced legislative amendments into their various assemblies, with the majority of them justifying their delay and inaction by maintaining, for example, that "review...of legislation for Charter violations will now become a continuing process as new legislation is passed and as Charter rights are clarified by Court decisions."[15] Some governments have succeeded in meeting the general time frame contemplated in 1982: the Federal government, British Columbia, Alberta, Saskatchewan, and the Yukon, for example, have completed and intend to introduce Charter Omnibus Bills during the 1985 Spring Sessions of their Parliamentary and Legislative Assemblies. Although more timely in their preparation for the implementation of section 15, these provinces, as well as the other provinces, territories and federal government can nonetheless be criticized with respect to the nature of the proposed legislative revisions.

One of the major criticisms of existing Charter Omnibus amendments, and foreseeably those arising out of ongoing legislative reviews, relates to the general framework and context for scrutinizing legislative enactments. All the governments (provincial, territorial, federal) appear to have rejected an issue-oriented approach for the identification of existing inequalities and discrimination, in favour of a more technical analysis of the individual provisions of particular statutes. While perhaps an efficient vehicle for ferreting out specific legislative enactments which on their face clearly

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[15] "Bill 95, The Charter Omnibus Act," Alberta News Release, Nov. 9, 1984.

conflict with specific Charter rights, common sense and comparative experience (e.g. the U.S. case) suggest that such a technical and narrow approach is only of limited benefit in what has been touted as a broader attempt to eliminate discriminatory policies and practices. As one independent audit of provincial legislation has cautioned in rejecting the sectional legislative review approach:

> Discrimination can be subtle; it can be an unconscious or unintended by-product of otherwise beneficial legislation... The discrimination may be expressly set out in the wording of a statute; it may be implicit rather than overtly stated. Discrimination may result from the application of seemingly neutral provisions; even failure to legislate in a particular area may have a disparate impact.[16]

This statement seems to suggest that while a systematic review of legislation aimed at amending unconstitutional provisions may have the result of synchronizing legislation with the letter of the law, it may at the same time risk ignoring legislative harmonization with the spirit of that law. This "missing the forest for the trees" criticism may help explain the overall provincial neglect of education as a possible and important area for reforming existing legislation and policy with the equality rights enshrined in the Charter.

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16 "Report on the Statute Audit Project," Charter of Rights Educational Fund, (Toronto, Ontario, 1985), p. 1.4.

III. Legislative Amendments and Public Response to Equality in Education: Different Definitions of Discrimination

"It appears to me that education in most parts of Canada is in relatively good health in terms of rights and discrimination."

Clarence Cormier
Minister of Education,
New Brunswick[17]

"...it is clear that whatever the good intentions of the school system, it does not provide training which enables men and women to compete equally for jobs, money and social status."

Non-governmental Statute
Audit Report (Ontario)
Charter of Rights Educational Fund[18]

These two assessments clearly illustrate the most striking finding of our governmental survey, namely, the large gap that exists between how governments on the one hand, and public interest groups and professional education associations on the other, perceive the state of non-discrimination and equality in Canadian educational policy and practice. For example, while the majority of provincial Ministries and Departments of Education were quick to express a commitment to full equality of access to and benefit of educational services, the scanty proposals for legislative reform in the educational sector suggest that this commitment in principle is a far cry from what may exist in practice.

Legislative Amendments

Briefly, of all the legislative Charter discussion papers and Charter omnibus bills analyzed in this study -- and these included material from the Federal government B.C., Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and the Yukon -- as of April 17, 1985 only four actual statutory amendments were proposed. Of these legislative revisions, moreover,

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[17] Clarence Cormier, "Rights and Freedoms: Section 15 and Public Education," The Canadian School Executive, January, 1985, p. 29.

[18] Supra, note 16 at 2.1.

only one amendment touched upon a substantive equality issue, namely, equal opportunity of religious observance during school hours. The remaining three amendments dealt with issues related but peripheral to education and schooling, specifically, pension benefits and mandatory retirement. Given the short list of statutory amendments in the educational sector it is interesting to describe briefly the actual legislative revisions proposed to date.

Section 12 of the Saskatchewan Charter Omnibus Bill 41 amends two sections of the Saskatchewan Education Act[19]: section 34(b) and section 181(b). Section 34(b) provides for situations where a school board member must mandatorily retire or vacate his or her office because of "incapacity by reason of physical or mental illness." If passed into law, Bill 41 would delete this subsection on grounds that it violates section 15 of the Charter "by defining incapacity solely in terms of physical or mental illness."[20] A second, and more mainstream consideration is the amendment to s. 181 of the Saskatchewan Education Act which would provide that "pupils who have written consent from their parent or guardian...be exempt from attending class while the Lord's Prayer or Bible passages are being read."[21] This new subsection, section 181(2.1) was originally identified as a necessary concession to the Charter's freedom of religion clause, however, important and obvious equality considerations also underlie this provision, and may likely form the basis of imminent legal action challenging religious instruction in schools throughout the country.[22]

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[19] R.S.S. 1978 (Supp.), c. E-01.

[20] "Compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms," Saskatchewan Dept. of Justice (Sept. 1984), p. 7.

[21] Ibid, at 8.

[22] See forthcoming by M.E. Manley-Casimir and T.A. Sussel, "Bible, Prayer and School: A New Constitutional Agenda."

The remaining two legislative changes arise out of the discussion paper tabled by the Newfoundland Charter review committee and concern the administration of benefits. One proposed that the Education (Teacher's Pension) Act[23] be revised to eliminate discrimination on grounds of mental or physical incapacity. The second proposed that the Memorial University (Pensions) Act[24] be amended to eliminate sex-based discrimination. Sections 16(2), 21(1) and 24 should be amended so that the reference to "widow" whenever it occurs, would be changed to "surviving spouse."

Provincial reticence at legislating equality reforms suggests two possible explanations: first, that assessments regarding the "healthy state" of equality in education are basically accurate, and accordingly no extensive legislative action is warranted; or, second, and alternatively, that provincial considerations of equality in education have thus far been incomplete and that further law reform in this area is necessary. The survey reported here revealed that, despite the overall weak law reform performance among provincial governments, clear differences of opinion existed in the different ministries and departments of education regarding this highly contentious issue. Such opinions can roughly be divided into two schools of thought according to agreement with one or the other scenarios outlined above. No governmental policy, of course, is ever spelled out in black and white terms -- especially in such a complex and politically sensitive area as equality rights -- but certain general policy orientations regarding the nature and scope of section 15 are discernible among different education policymakers in the various provinces. While certainly not apparent from

[23] R.S.N. 1970 c. 102.

[24] R.S.N. 1970 c. 232.

substantive legislative amendments in the educational sector, such orientations did emerge in the various provincial responses to this study's letter-questionnaire, and, in general, comments made by government officials regarding the Charter. In most cases, these orientations are reflected in an individual Minister's or province's attitude toward the Charter in general, and the equality guarantees in particular. Thus, for example, at one end of the spectrum, the New Brunswick Minister of Education has characterized the Charter's equality provisions as a potential "worry" and "threat" to legislative authority in the educational sphere, and appears to regard section 15 more as a nuisance than a tool for positive educational reform. For example, in an article reassuring educators that they need not feel threatened by section 15, the Minister concluded:

> To me, the fact we are involved with the education of children is a statement of our belief in the right of all educable children to AN education. The Charter with the new section 15, is also a statement of that right, I cannot (therefore) fear or resent the Charter of Rights and Freedoms...[25]

British Columbia Attorney-General, Brian Smith, has expressed a cautionary approach to section 15 in even stronger terms, stating less than one month prior to implementation of the Charter's equality guarantees that: "we've gone too far down the road in Canada in the last five years of emphasizing people's rights and not their responsibilities."[26] The Education Ministry has, moreover, refused to give into teachers' demands for equal bargaining rights, and thus currently faces a court action challenging provisions in the B.C. School Act.[27]

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25 Cormier, supra, note 17 at 29.

26 Vancouver Sun, March 21, 1985, p. 10.

27 R.S.B.C. 1979, c. 375 and amendments.

A more positive attitude towards the Charter's equality guarantees has been expressed, for example, in the Ontario and Saskatchewan Ministries of Education. Thus despite the meagre attention devoted to law reform, equality and education, educational policymakers in these provinces appear generally to regard section 15 as a road map for the implementation of full equality and non-discrimination in the educational sector. Over the last several years the Ontario provincial government has introduced measures including school board consolidation aimed at a fairer allocation of available resources, options and opportunities; enacted Bill 82, which is designed to accommodate "exceptional" students; committed resources to the development of affirmative action programs in the public school system; attempted to accommodate minority language education rights; and more recently introduced measures to provide full funding for Roman Catholic secondary schools -- a move that has embroiled the province in a heated debate where politics, equality and education have explosively interacted (see below).

Government officials in Saskatchewan also appear to be more positively disposed towards the Charter's equality provisions, and in response to this study's letter-questionnaire, for example, the Ministry of Advanced Education and Manpower indicated that in view of section 15, there had been "a very deliberate strategy to improve equality of access," including maintenance of reasonable geographic access to education and training; provision of financial assistance to students with special needs; delivery of programs targetted to the needs of youth, natives, and women; and finally the long-term development of consultation mechanisms with client group organizations to assist in identifying and resolving problems of accessibility.[28]

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[28] Letter received from the Saskatchewan Minister of Advanced Education and Manpower, Jan. 14, 1985.

The above examples of attitudes and strategies for dealing with the Charter's equality provisions in certain instances as stated by particular individuals, certainly are not intended as generalizations characterizing different provinces as simply either being pro or con equality in education. What they do tend to indicate, however, is that as in so many areas of Canadian life today, legislative attitudes to, and activity in the educational sector are certainly not consistent and generally are in a state of flux. Thus, some areas of legislative equality reform in education are more advanced than others, and some provinces appear to have undertaken more legislative activity in these areas than others.

Overall, it is quite apparent that all the provinces, however, deserve the strong criticism levelled at their reluctance to take up the challenge offered to them by section 15 during the past three years. Consequently, as of April 17, 1985, a future agenda will have to be drawn up by those interested citizens and educators committed to translating the principle of constitutional equality into educational policy and practice.

The Public Response

The preceding discussion in this section has emphasized provincial measures taken in preparation of the implementation of section 15 in general, and with regard to equality issues in education in particular. Numerous special interest and pressure groups have also played a vital part in the rapidly unfolding constitutional dynamic that is transforming the context and structure of rights in Canada. As mentioned in the introduction, organizations as varied as the Legal Action Education Fund (LEAF), the Charter of Rights Educational Fund (CREF), the Advocacy Resources Centre for the Handicapped (ARCH), the Public Interest Advocacy Center (PIAC) and the Canadian Civil Liberties Association (CCLA) are playing a vocal role in this

process -- urging governments both to adopt certain policies and directions, and monitoring the success of public officials in achieving these goals.

One of the most active organizations in this respect has been the Charter of Rights Educational Fund, which recently released an independent statute audit of Ontario legislation in the light of the implementation of the Charter's equality provisions.[29] Specifically concerned with genderic equality as guaranteed in sections 15 and 28 of the Charter, the Statute Audit report canvassed a variety of Ontario legislation, including statutory enactments in the educational sector. In contrast to the provincial legislative review mechanisms, CREF chose to take an issue-oriented approach to its statute audit. Accordingly, it first looked to existing inequalities and discrimination in women's lives, and then turned to a statute review to determine whether legislation could be related back to, or seen as a function of particular legislative enactments; or alternatively if some form of legislative action could be effective in eliminating a discriminatory practice. The massive 577 page report was loosely organized and undertaken with the understanding that:

> Racism, sexism and other forms of discriminatory treatment are so embedded in our institutions and in our lives that we often fail to recognize them for what they are. It is thus entrenched systemic discrimination which is the most pervasive and the most devastating, precisely because it is so invisible.[30]

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[29] CREF has stated that its goals are "to play an active role in the education and implementation of the Charter equality provisions, and to educate the legal and lay public on sex discrimination issues and the potential for redress through the Charter." Supra, note 16 at 1.1.

[30] Ibid, at 1.44.

The findings revealed in the statute audit in the educational sector clearly substantiates and illustrates this philosophy. Thus, for example, the study observed with regard to sexual equality:

> A canvass of the statutes in the field of education yields very little in the way of overt discrimination...The statutes which pertain to the provision of education are generally facially neutral...it is clear that it is the policy of the Ministry of Education of the Province of Ontario to provide education in a sex equitable manner. However, it is clear that much of the educational system is not sex equitable, despite the facial neutrality of the statutes which underlie it. The problem is that a facially neutral set of statutes live within a society which is not gender neutral.[31]

Notwithstanding the absence of any clear-cut or "facially" discriminatory statutory provisions, the CREF statute report -- notably unlike any provincial legislative reviews -- took its statute audit one step further to determine what, if any, policies and practices actually promoted sex-based inequality in education. In areas including vocational training; curriculum, resource materials, and classroom management techniques; athletics and sports; counselling services; admissions policies; discipline and appearance codes; pregnancy and child care issues; and funding and financial aid, the study identified numerous examples of genderic inequality fostered either by existing educational policies and practices and/or the absence of any remedial legislation. In its overall conclusions, the study recognized the clearly unsatisfactory state of sex-based equality within the educational context, and in its closing remarks recommended that "governments...take on the challenge of bringing about educational change which will make use of the courts unnecessary."[32]

[31] Ibid., at 2.1

[32] Ibid., at 2.31.

Clearly the recent attempts of Canadian governments to introduce Charter-based legislative reform have not addressed the many issues raised in the CREF study of Ontario legislation. Moreover, the study's findings of widespread genderic discrimination and inequality within the educational sector certainly has broader applications and implications for other minority groups within all the provinces and territories, and illustrates the necessity of farreaching law reform in this important area.

That the current round of legislative amendments has not adequately anticipated or addressed the multitude of issues and problems that may arise in response to the Charter's guarantees of equal protection and benefit before and under the law, is perhaps not remarkable given the problems and resources associated with such a formidable undertaking -- especially at this early stage of constitutional development. After all, when citizens' rights are at stake, anything short of perfection is unsatisfactory and likely to give rise to strong criticism and debate. What has proved to be more remarkable and unfortunate, however, is the overall lack of attention, recognition or understanding on the part of government representatives of the need for ongoing and far-reaching legislative reform and policy reorientation in the field of education, above and beyond any current piecemeal initiatives.

Conclusion

On a prima facie basis, then, the federal and provincial/territorial governments seem to have adopted a narrow, technical, limited, and superficial approach to the task of revising and harmonizing their legislation with the standards defined in section 15 of the Charter. A generous interpretation of this strategy is that governments -- not wishing to move ahead more quickly and thoroughly than the courts might subsequently require -- have opted to defer any major legislative changes until after the courts have dealt more

thoroughly with the interpretation and application of the Charter's equality guarantees. The provinces could, of course, have sought judicial clarification on contentious issues of educational policy, as did the Ontario government with regard to the constitutional validity of the minority language education provisions of the Ontario Education Act:[33] responses from the majority of provincial departments and ministries of education and justice revealed, however, that such an approach was specifically rejected. That the provincial legislatures did not generally consider judicial interpretation to be an acceptable tool for statutory and policy clarification in the field of education suggests either that the provinces chose not to raise issues that might subsequently have become problematic for existing educational policy and practice[34] or -- and this seems at least equally likely -- they simply do not realize and appreciate the potential scope and effect of the equality provisions on educational policy. Symptomatic of this lack of understanding is the following comment from one reply to the letter-questionnaire inquiry about the potential effect of section 15 on Manitoba's laws:

> Manitoba has had a "Human Rights Act" since 1974. This act prohibits discrimination on the basis of, "race, nationality, religion, colour, sex, marital status, physical handicap, age, source of income, family status, ethnic or national origin of that person." I do not believe that section 15 of the Charter of Rights and Freedoms enhances the equality rights of Manitobans beyond those they already enjoy.

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[33] Reference re: Minority Language Education Rights, unreported, June 27, 1984 (Ontario, C.A.).

[34] For an indepth discussion of the changing role of the judiciary in Canadian educational policymaking see the authors' article, "The Supreme Court of Canada as a National School Board," in M.E. Manley-Casimir and T.A. Sussel, Courts in the Classroom: Educational Change and the Canadian Charter of Rights and Freedoms (forthcoming).

This illustrative response clearly suggests that Canadian educational policymakers at all levels of the enterprise have very little substantive appreciation of the potentially profound and far-reaching effects of the Charter equality provisions on their professional practice. Such neglect of this important area may prove to be extremely short-sighted, given that the interplay of socio-economic, linguistic, cultural, political and legal issues in the educational context may very likely see education in Canada -- as is already evident in the U.S. experience -- emerge as an important turntable of constitutional change, particularly in terms of equality rights.[35]

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[35] See forthcoming M.E. Manley-Casimir and T.A. Sussel, Equality in Education: Constitutional Issues and Implications.